SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-5006

LAWRENCE McCALL,

Petitioner

v.

STATE OF NORTH CAROLINA,

Respondent

BRIEF OF THE RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I N D E X

TABLES OF CASES

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Respondent opposes the issuance of a writ of certiorari in this case for the reasons which follow.

REASONS THE WRIT SHOULD
NOT BE GRANTED

I

THE REFERENCES IN THE PROSECUTOR'S CLOSING ARGUMENT TO PETITIONER'S ATTORNEY BEING FROM A LARGE, DISTANT CITY WERE GENERALLY JUSTIFIED, AND IN ANY EVENT, DID NOT CAUSE A FUNDAMENTALLY UNFAIR TRIAL OR DEPRIVE HIM OF EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner first contends that the prosecutor's closing argument deprived him of due process of law and effective assistance of counsel. He asserts it did this because several references to his lawyer being from a big city

out of the county demeaned the credibility of his attorney's arguments and appealed for conviction on the basis of regionalism. Some such references appear in the record, however, they did not deprive petitioner of a fair trial, and this Honorable Court should not issue a writ of certiorari to review the matter.

The references involved appear at Appendix C of the petition, pp. 1c, 2c as follows:

> "[The first person these witnesses said anything to was] Mr. Ransdell that practices law down in the big city of Raleigh. Now why is it necessary for her to go to Raleigh and get the message across of - a year and one-half later ... why is it necessary for her to go to Raleigh to talk to Mr. Ransdell."
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> * * * * * * * *
>
> "[Mr. Ransdell made light of Mr. Melvin Owens' religion] ... every man doesn't have an engraved certificate showing that he has been ordained as a minister. Maybe they have golden engraved certificates down in Raleigh where Mr. Ransdell comes from, showing that some man is the pastor of the First Baptist Church of the big city of Raleigh."
>
> * * * * * * * *
>
> "[Mr. Ransdell] came up here last Friday and he stood right here in the courtroom and looked out there and said, 'Mr. Melvin Owens is a liar', and I resent anybody coming into Transylvania County when he doesn't even know the county and doesn't know the citizens of this county. Listen, I have been in this county seventeen years, and if I was going to prove a man's character I wouldn't come all the way from Raleigh to call him a liar. I would have somebody in this community to go on the witness stand ... that's the way you prove character."
>
> * * * * * * * *

> "You show me one citizen in Transylvania County that took the oath on the Holy Bible and said Mrs. Flora Owens wasn't worthy of belief. The only person that said that is the man from Raleigh, North Carolina, big city of Raleigh."
>
> * * * * * * * *
>
> "You ought to be proud of your law enforcement officers here. I don't know how they do it down in Raleigh where Mr. Ransdell is from, you know that big city."
>
> * * * * * * * *
>
> "[Somebody on the other side argued that the gun was between the mattress and the springs because they didn't have any closets in the house.] That must have been Mr. Ransdell, I don't believe Mr. Potts would believe that. Mr. Potts has lived in this county he knows people don't keep shot guns between the mattress and springs."

None of these instances merit the Court's further concern.

A number of reasons dictate this. First, the second, third and fourth remarks above were invited by the preceding defense argument attacking the Owens' credibility. This is set out in the North Carolina Supreme Court opinion on the case, and the Court is respectfully referred to page 6A of the petition for review of the defense argument. Second, no objection was lodged to these remarks at that time indicating that they seemed less important then than they do now in retrospect.[1] Third, the remarks involved,

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[1] In this regard, Mr. Ransdell was District Attorney for Wake County, North Carolina from 1963 to 1972, see 258 NC v (1963), 281 NC ix (1972), and is one of the more capable criminal attorneys in the State.

while abrasive, did not broach a subject of widespread condemnation, such as race prejudice; or deal with the defendant himself. Therefore, they were not likely to inflame the jury against the defendant, and when it is remembered that the jury "hung" on one of the two charges against petitioner, it must be concluded that the remarks did not do so. Finally, all but one of the references seem to have served a valid purpose in the argument. The first reference was made to stress the fact that certain evidence was unusual; the second was made to rehabilitate a state's witness; the third, fourth and sixth were to emphasize weaknesses in the defense argument. In light of the foregoing, it is submitted that neither error or prejudice is shown by this contention, and therefore, it should not be the basis for issuance of a writ of certiorari.

II

NEITHER THE HOLDING OR RATIONALE OF MULLANEY V. WILBUR, 421 US 684 (1975) VOIDS THE PRESUMPTIONS PETITIONER ATTACKS AND THE CASE WAS RIGHTLY DECIDED BELOW.

Petitioner next contends the use of two presumptions denied him due process of law under the decision in Mullaney v. Wilbur, 421 US 684 (1975) and that this decision should have been applied to the presumptions in his case and his conviction reversed. The presumptions are that a killing is presumed both unlawful and done with malice once the intentional use of a deadly weapon to effect the killing is proved. This is a correct statement of state law, however, it is not unconstitutional and a writ of certiorari should not issue to review it.

Petitioner's complaint rises in the context of the jury charge which appears as Appendix D to this petition (no page number). The particular part of the charge at issue is as follows:

> "Now where it is shown that a person intentionally with the use of a deadly weapon, kills another, nothing else appearing, two presumptions arise. First, that it was unlawful, that is the killing was unlawful, and second, that it was done with malice. And an unlawful killing with malice is murder in the second degree... . If the defendant unlawfully and with malice, but without fixed design to kill, and not as a result of premeditation and deliberation, shot and killed them, he would be guilty, not of first degree, but of murder in the second degree."

This instruction does not show that petitioner was deprived of his liberty without due process of law.

Several factors indicate this. First, unlike the situation in Mullaney, the burden of proof was not shifted to the defendant in any regard in this case. Instead, by the use of the words "nothing else appearing", he was placed under a burden of production of evidence only, a burden impliedly endorsed by the Mullaney decision in footnote 28 thereof, which reads:

> "Many states do require the defendant to show that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt... . Nothing in this opinion is intended to affect that requirement."

Further, the presumptions in this case do not run afoul of the concern which underlay the Mullaney decision. The vice

condemned there was the possibility of conviction for one offense when it was as likely as not that an accused deserved conviction on a significantly lesser offense. However, this is not enhanced by use of the presumptions in this case because the killing of another with a deadly weapon is not normally as likely as not a lawful act or one done without the quality of malice accompanying it. Instead, in the overwhelming number of cases, the opposite is true. Accordingly, the use of the presumptions in this case enhances the reliability of the fact-finding process, by precluding a "doubting Thomas" approach to the evidence. It is constitutional by parallel to the requirements inferences must meet under Barnes v. United States, 412 US 837 (1973), ie. "... if a statutory inference ... is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt ... then it clearly accords with due process.". Lastly, the Mullaney decision should not be held retroactive, however, this is an open question and is not grounds for opposition to the petition itself. In this regard, however, respondent is informed and believes that there are a number of petitions before the Court at this time which present the same question for the Court's consideration. In light of the foregoing, petitioner's conviction was constitutionally obtained in the regard complained of and certiorari should not issue to review it.

III

THE DEATH PENALTY PROVISION UNDER WHICH PETITIONER WAS SENTENCED TO DIE HAS BEEN DECLARED UNCONSTITUTIONAL AND THEREFORE THE THIRD REASON OFFERED FOR GRANTING THE WRIT IS MOOT.

Petitioner's third basis for review is an attack on the validity of North Carolina's death penalty. Since this petition was filed, the Court has declared that law unconstitutional, Woodson v. North Carolina, ___ US ___ (1976), which decision inures to the benefit of petitioner. Therefore, the issue is a moot one and not a fit subject for review by this Court, North Carolina v. Rice, 404 US 244 (1971). Accordingly, a writ of certiorari should not issue on account of this matter.

CONCLUSION

In conclusion, your respondent requests as its relief the denial of the writ of certiorari for which petitioner has applied in this case.

This the 1st day of October, 1976.

Respectfully submitted,

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